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Muhammed Yusoff Rawther v Dato' Seri Anwar bin Ibrahim

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-491–07 OF 2021
MOHD JOHAN LEE JC
22 NOVEMBER 2022

C *Civil Procedure — Striking out — Application for — Plaintiff applied to strike out defendant's statement of defence and counterclaim — Whether defendant required to plead evidence to corroborate statements pleaded in statement of defence — Whether statements sought to be struck out were relevant — Whether statements sought to be struck out contradicted s 52 of Evidence Act 1950* D *— Whether defendant had pleaded all essential elements of tort of abuse of process in his counterclaim — Whether defendant should have brought striking out application if plaintiff's action constituted abuse of process rather than filing counterclaim — Whether defendant's statement of defence and counterclaim ought to be struck out — Rules of Court 2012 O 18 r 7 & O 18 r 19(1)*

E

The plaintiff's claim against the defendant was for sexual assault. The defendant had filed a statement of defence and counterclaim against the plaintiff's claim. The defendant's counterclaim was premised on the tortious action of abuse of process of the court whereby the defendant alleged that the F purpose of the plaintiff's action was to tarnish the defendant's reputation and his political career. The plaintiff subsequently filed the present application ('encl 23') pursuant to O 18 r 19(1) of the Rules of Court 2012 ('the ROC') praying to: (a) strike out paras 7.3, 17, 19.3, 19.4, 19.5 and the last sentence of para 20 of the defendant's statement of defence ('the impugned statements'); G and (b) strike out the defendant's counterclaim. The gist of the impugned statements was basically in relation to the defendant's version on how the plaintiff came into the defendant's employment and the plaintiff's subsequent transfer to and resignation from Yayasan Aman. The plaintiff submitted that: (i) the impugned statements were scandalous, frivolous, or vexatious since no H evidence could substantiate it; (ii) the impugned statements contradicted s 52 of the Evidence Act 1950; (iii) the defendant would not be able to produce any evidence during trial because the defendant's key witness had passed away; and (iv) the defendant should have brought a striking out application if the plaintiff's action constituted an abuse of process rather than filing a I counterclaim. The defendant on the other hand submitted that: (1) at this stage, it was not for the defendant to produce evidence to justify the impugned statements as it should be put forward during trial via viva voce evidence; and (2) the impugned statements did not constitute character evidence but rather the explanation and response of certain events that had been pleaded by the

plaintiff in his statement of claim. In relation to the plaintiff's application to strike out the counterclaim, the issue arose was whether the defendant had pleaded all the essential elements of the tort of abuse of process in his counterclaim.

Held, dismissing encl 23 with costs:

(1) The court agreed with the defendant that there was no need for him to produce and/or plead any evidence to corroborate the statements that he had pleaded in his defence. At this juncture, it was not for the court to interfere with any facts implored in the litigants' respective pleadings (see para 14).

(2) The court agreed with the defendant that the impugned statements were in fact relevant since it was the defendant's version about how the plaintiff came into the defendant's employment and the plaintiff's subsequent transfer to and resignation from Yayasan Aman. Looking at the impugned statements, it would be unjust for the court to ignore and simply expunge the defendant's averment in response to the issue raised by the plaintiff in his statement of claim. Even if such fact led to bad character evidence, it was the defendant's duty to prove it as such. As far as the court was concerned, the defendant was allowed to plead facts that he deemed necessary to be his defence. If at all, the parties could explore this in their submissions at the end of trial. Only then the court would determine this issue (see para 18).

(3) The court found that the defendant had pleaded all the elements of the tort of abuse of process in his counterclaim. The key rule to pleading was to plead material facts and not evidence. Order 18 r 7 of the ROC could not be clearer on this. In the present case, the defendant had pleaded his case in his counterclaim. How he would establish or prove his case during trial was entirely up to him. Likewise, how he would establish his case when a key witness had passed away was something for him and his team to work out during trial. The court could not strike out the defendant's counterclaim at interlocutory stage just because the plaintiff believed that the defendant could not prove his counterclaim. Thus, the court held that there was a reasonable cause of action raised by the defendant in his counterclaim and the defendant's counterclaim was not one of those cases suitable to be struck out at this juncture (see paras 25–27 & 30–31).

(4) When a defendant contended that the case against him/her was an abuse of court process, he had two options, either to apply to strike out the claim through an application under O 18 r 19 of the ROC or to have a separate counterclaim against the plaintiff. The court would not stop the defendant from proceeding with a counterclaim for abuse of court process just because the option under O 18 r 19 was available. It was up to the defendant to choose whatever action he deemed suitable for him to

A put forward his claim as long as it was within the rule and procedure of the court. Since the action for tort of abuse of process was an action recognised by the courts, there was no reason for the court to dismiss it as such (see paras 32 & 34).

B (5) The grounds raised by the plaintiff were not enough for the court to dismiss the defendant's counterclaim at this stage. There were conflicting facts and serious issues to be tried in this action. The defendant had raised several issues of facts which must be scrutinised by the court via viva voce evidence. Hence, it would not be just at this stage to deny the defendant C the chance to put forward his case in trial. In conclusion, the plaintiff had failed to prove to the court that the impugned statements and the defendant's counterclaim ought to be struck out interlocutorily (see paras 35–37).

D **[Bahasa Malaysia summary**

Tuntutan plaintif terhadap defendan adalah berkaitan dengan gangguan seksual. Defendan telah memfailkan pernyataan pembelaan dan tuntutan balas terhadap tuntutan plaintif. Tuntutan balas defendan adalah berdasarkan tort penyalahgunaan proses mahkamah di mana defendan mendakwa bahawa E tujuan tindakan plaintif adalah untuk mencemarkan nama baik defendan dan kerjaya politiknya. Plaintif kemudiannya memfailkan permohonan semasa ('lampiran 23') menurut A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') bagi memohon untuk: (a) membatalkan perenggan 7.3, 17, 19.3, 19.4, 19.5 dan ayat terakhir perenggan 20 pernyataan pembelaan F defendan ('pernyataan yang disangkal'); dan (b) membatalkan tuntutan balas defendan. Intipati pernyataan yang disangkal tersebut pada asasnya adalah berkaitan dengan versi defendan tentang bagaimana plaintif diambil bekerja dengan defendan dan seterusnya pemindahan plaintif dan peletakan jawatannya daripada Yayasan Aman. Plaintif berhujah bahawa: (i) pernyataan G yang disangkal tersebut adalah mengaibkan, remeh atau menyusahkan kerana tiada keterangan yang dapat mengesahkannya; (ii) kenyataan yang disangkal tersebut bercanggah dengan s 52 Akta Keterangan 1950; (iii) defendan tidak akan dapat mengemukakan apa-apa keterangan semasa perbicaraan kerana saksi utama defendan telah meninggal dunia; dan (iv) defendan sepatutnya H membawa permohonan untuk membatalkan jika tindakan plaintif membentuk penyalahgunaan proses dan bukannya memfailkan tuntutan balas. Defendan sebaliknya berhujah bahawa: (1) pada peringkat ini, defendan tidak perlu mengemukakan keterangan untuk membuktikan pernyataan yang disangkal tersebut kerana ia perlu dikemukakan semasa perbicaraan melalui I keterangan viva voce; dan (2) pernyataan yang disangkal tersebut bukan merupakan keterangan watak tetapi sebaliknya penjelasan dan tindak balas ke atas peristiwa tertentu yang telah diplid oleh plaintif dalam pernyataan tuntutannya. Berhubung dengan permohonan plaintif untuk membatalkan tuntutan balas tersebut, isu yang timbul ialah sama ada defendan telah

memplid semua elemen penting tort penyalahgunaan proses dalam tuntutan balasnya. A

Diputuskan, menolak lampiran 23 dengan kos:

(1) Mahkamah bersetuju dengan defendan bahawa tidak ada keperluan untuk dia mengemukakan dan/atau memplid apa-apa keterangan untuk menyokong pernyataan yang diplid dalam pembelaannya. Pada peringkat ini, mahkamah tidak boleh campur tangan dengan mana-mana fakta yang dipohon dalam pliding pihak-pihak dalam litigasi (lihat perenggan 14). B C

(2) Mahkamah bersetuju dengan defendan bahawa pernyataan yang disangkal tersebut sebenarnya relevan kerana ia adalah versi defendan tentang bagaimana plaintif diambil bekerja oleh defendan dan seterusnya pemindahan plaintif dan peletakan jawatannya daripada Yayasan Aman. Melihat kepada pernyataan yang disangkal tersebut, adalah tidak adil bagi mahkamah untuk mengabaikan dan hanya mengenepikan hujahan defendan sebagai tindak balas kepada isu yang dibangkitkan oleh plaintif dalam pernyataan tuntutannya. Walaupun fakta sedemikian membawa kepada keterangan watak yang buruk, adalah menjadi tanggungjawab defendan untuk membuktikannya. Mahkamah berpendapat bahawa defendan dibenarkan untuk memplid fakta yang difikirkannya perlu untuk menjadi pembelaannya. Jika ada pun, pihak-pihak boleh membangkitkan perkara ini dalam penghujahan mereka pada akhir perbicaraan. Hanya selepas itu mahkamah akan menentukan isu ini (lihat perenggan 18). D E F

(3) Mahkamah mendapati defendan telah memplid semua elemen tort penyalahgunaan proses dalam tuntutan balasnya. Peraturan utama untuk pliding adalah untuk memplid fakta material dan bukan keterangan. Ini adalah sangat jelas berdasarkan A 18 k 7 KKM 2012. Dalam kes ini, defendan telah memplid kesnya dalam tuntutan balasnya. Bagaimana dia akan menubuhkan atau membuktikan kesnya semasa perbicaraan adalah terpulang kepadanya sepenuhnya. Begitu juga, bagaimana dia akan membuktikan kesnya apabila saksi utama telah meninggal dunia adalah sesuatu yang perlu dia dan pasukannya selesaikan semasa perbicaraan. Mahkamah tidak boleh membatalkan tuntutan balas defendan pada peringkat interlokutori hanya kerana plaintif percaya defendan tidak dapat membuktikan tuntutan balasnya. Oleh itu, mahkamah berpendapat bahawa terdapat kausa tindakan yang munasabah yang dibangkitkan oleh defendan dalam tuntutan balasnya dan tuntutan balas defendan bukanlah salah satu daripada kes-kes yang sesuai untuk dibatalkan pada peringkat ini (lihat perenggan 25–27 & 30–31). G H I

(4) Apabila defendan berhujah bahawa kes terhadapnya adalah penyalahgunaan proses mahkamah, dia mempunyai dua pilihan, sama

ada untuk memohon untuk membatalkan tuntutan melalui permohonan di bawah A 18 k 19 KKM 2012 atau memfailkan tuntutan balas yang berasingan terhadap plaintif. Mahkamah tidak akan menghalang defendan daripada meneruskan tuntutan balas untuk penyalahgunaan proses mahkamah hanya kerana pilihan di bawah A 18 k 19 tersedia. Terpulang kepada defendan untuk memilih apa sahaja tindakan yang difikirkannya sesuai untuk dia mengemukakan tuntutannya selagi ia mengikut peraturan dan prosedur mahkamah. Oleh kerana tindakan tort penyalahgunaan proses adalah tindakan yang diiktiraf oleh mahkamah, maka tidak ada sebab untuk mahkamah menolaknya (lihat perenggan 32 & 34).

(5) Alasan yang dibangkitkan oleh plaintif tidak mencukupi untuk mahkamah menolak tuntutan balas defendan pada peringkat ini. Terdapat fakta yang bercanggah dan isu-isu serius untuk dibicarakan dalam tindakan ini. Defendan telah membangkitkan beberapa isu fakta yang mesti diteliti oleh mahkamah melalui keterangan viva voce. Oleh itu, adalah tidak adil pada peringkat ini untuk menafikan peluang defendan untuk mengemukakan kesnya dalam perbicaraan. Kesimpulannya, plaintif telah gagal untuk membuktikan kepada mahkamah bahawa pernyataan yang disangkal tersebut dan tuntutan balas defendan patut dibatalkan secara interlokutori (lihat perenggan 35–37).]

Cases referred to

Bandar Builder Sdn Bhd v United Malayan Banking Corp Bhd [1993] 3 MLJ 36, SC (refd)

Bukit Baru Villas Sdn Bhd v Yeoh Teen Eam & Ors [2017] MLJU 2248, HC (refd)

CC NG & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347, FC (refd)

Dato' Ahmad Zahid bin Hamidi v Amir Bazli bin Abdullah [2012] 6 MLJ 564, CA (refd)

Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and another appeal [2018] 2 MLJ 51, CA (refd)

Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit [2003] 2 MLJ 226, HC (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (refd)

Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ 473, CA (refd)

Tube Home (M) Sdn Bhd v P Shanmugam @ SA Ponmugam & Anor [2010] 1 MLJ 206; [2010] 10 CLJ 678, HC (refd)

Legislation referred to

Evidence Act 1950 s 52
Rules of Court 2012 O 18 rr 7, 19, 19(1)

Mahajoth Singh (Abd Halim Ushah & Assoc) for the plaintiff.
Navpreet Singh (Jeffrey Tan & Ching) for the defendant.

Mohd Johan Lee JC:

INTRODUCTION

[1] This is a case where the plaintiff filed an application in encl 23 ('this application') pursuant to O 18 r 19(1) of the Rules of Court 2012 ('the ROC 2012') praying to:

(a) strike out and/or expunge paras 7.3, 17, 19.3, 19.4, 19.5 and the last sentence of para 20 in the defendant's statement of defence dated 28 September 2021 (collectively, 'the impugned statements'); and

(b) strike out the defendant's counterclaim dated 28 September 2021.

FACTS OF THE CASE

[2] Essentially, the cause of action of the plaintiff's claim is concerning a sexual assault allegedly committed by the defendant to the plaintiff on 2 October 2018. The plaintiff had pleaded several facts relating to the alleged sexual assault which were all heavily denied by the defendant.

[3] Following the filing of the defendant's statement of defence and counterclaim, the plaintiff then filed this application. For ease of reference, these are the impugned statements:

(a) para 7.3:

> The late S.M Mohamed Idris had informed DSAI that Yusoff was not working at the material time and had disciplinary issues. The late S.M. Mohamed Idris sought a favour from DSAI to see if he could make arrangements for Yusoff to work at DSAI's office, in hopes of Yusoff turning over a new leaf

(b) para 17:

> Sometime in end-2018/early 2019, as a result of issues involving Yusoff and Meryl (elaborated at para 19 below), Yusoff was sent away from the Jalan Gasing Office to work in Yayasan Aman.

(c) para 19.3:

> In order to attend to these errands, Merryl gave Yusoff access to her credit

card. Merryl also paid Yusoff an allowance for the assistance he provided in this respect.

(d) para 19.4:

Sometime thereafter, Merryl discovered that Yusoff had misappropriated her funds by using her credit card to make unauthorised purchases.

(e) para 19.5:

As a result of this incident, and given that Merryl was based at the Jalan Gasing Office, Yusoff was sent to work at Yayasan Aman where he worked under supervision.

(f) para 20:

Yusoff continued to portray the same lack of discipline and lack of interest in his work and continued to be absent from work without permission and explanation at Yayasan Aman, as he did at the Jalan Gasing Office. DSAI further contends that Yusoff had, at the relevant material time, expressed his views showing him to be pro-Israel.

THE PLAINTIFF'S SUBMISSION

[4] Basically, the plaintiff submitted that the impugned statements were baseless and irrelevant to the case at hand. This is because the plaintiff's cause of action was solely based on the sexual assault allegedly committed by the defendant. The facts pleaded by the defendant were unnecessary for the cause of action.

[5] Moreover, the plaintiff also argued that the impugned statements pleaded by the defendant were with the intention to shed bad character evidence against the plaintiff. The plaintiff premised that the defendant's action was contrary to the provision provided in s 52 of the Evidence Act 1950. To support this, the plaintiff cited the case of *Tube Home (M) Sdn Bhd v P Shanmugam @ SA Ponmugam & Anor* [2010] 1 MLJ 206; [2010] 10 CLJ 678.

[6] Regarding the counterclaim, the plaintiff submitted that the defendant failed to disclose any reasonable cause of action against the plaintiff. The defendant alleged that the plaintiff's cause of action was an abuse of the court process, but he had never pleaded anything to show how the plaintiff's claim constitutes an abuse of process. It was further argued that no evidence was ever pleaded and/or stated to show that the plaintiff was politically motivated in filing his claim against the defendant. Here, the plaintiff also cited the case of *Bukit Baru Villas Sdn Bhd v Yeoh Teen Eam & Ors* [2017] MLJU 2248.

THE DEFENDANT'S SUBMISSION

[7] In opposing this application, the defendant submitted that it is imminent for the impugned statements to remain in the defendant's defence as it was pleaded to enlighten the defendant's version of facts that led up to the alleged sexual assault. The defendant further argued the impugned statements were all direct responses to the plaintiff's allegation.

[8] The defendant also premised that the impugned statements do not offend s 52 of the Evidence Act 1950 which renders probable or improbable any conduct imputed on the litigants to be irrelevant. In the alternative, the defendant also submitted that even if the impugned statements were indeed reflective of the plaintiff's character, s 52 permits such evidence if such character appears from facts otherwise relevant.

[9] For the counterclaim, the defendant contended that he had sufficiently pleaded all three elements for tortious action of abuse of process of the court. There is no obligation for the defendant to plead evidence since it is trite that in his pleadings, he only needs to plead the facts and not the evidence. The defendant also submitted that the plaintiff's argument that the defendant's counterclaim should be a striking out application in itself is misleading. The defendant argued that the tortious action of abuse of process of court is a recognised and distinct cause of action from a striking out application provided under O 18 r 19 of the ROC 2012. To support, the defendant quoted the case of *Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and another appeal* [2018] 2 MLJ 51.

FINDING AND DECISION

[10] From the facts adduced by the parties through affidavits and the exhibits and the submission by the learned counsels for both parties, it is my decision to dismiss this application. Herein are my reasons.

[11] Order 18 r 19 of the ROC 2012 on striking out applications is well-settled. In the Court of Appeal case of *Dato' Ahmad Zahid bin Hamidi v Amir Bazli bin Abdullah* [2012] 6 MLJ 564, Her Ladyship Zaleha Zahari JCA (as she then was) in delivering the judgment reiterated that:

> [17] *In respect of the second issue, the principles upon which a court acts in exercising its discretionary power under any of the four limbs of O 18 r 19(1) of the Rules are well settled. There is a surfeit of authorities on this point. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. The summary procedure can only be invoked when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'* (see *Bandar Builder Sdn Bhd & Ors v Untied Malayan Banking Corp Bhd* [1993] 3 MLJ 36).

A [18] *So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out* (see *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 (FC)). (Emphasis added.)

B **[12]** In this application through encl 23, the plaintiff's striking out application hinged on the following grounds:

(a) That paras 7.3,17,19.3,19.4,19.5 and the last sentence of para 20 in the defendant's Defence are unsubstantiated, irrelevant, and contrary to the principles of law and specifically contrary to the provision of section 52 of the Evidence Act 1950.

C

(b) The defendant's counterclaim:

(i) is speculative in nature;

(ii) is vague, lacks clarity and particulars;

D

(iii) does not identify any cause of action let alone any reasonable cause of action;

(iv) is premised upon the fact that the suit herein is an abuse of the process of the Court and therefore, the said objections ought to be taken up in the

E suit herein and not by filing a collateral action in the face of a counterclaim;

(v) has no relevance and/or connection with the reliefs sought by the plaintiff; and

F (vi) is clearly an afterthought.

[13] First and foremost, the plaintiff submitted that the impugned statements ought to be struck out due to its irrelevancy to the case at hand. The plaintiff further emphasised that the impugned statements were scandalous,

G frivolous, or vexatious since no evidence can substantiate it. To refute, the defendant argued that at this stage, it is not for him to produce evidence to justify the impugned statements as it should be put forward during trial via *viva voce* evidence.

H **[14]** On this, I am agreeable with the defendant that there is no need for him to produce and/or plead any evidence to corroborate the statements that he had pleaded in his defence. At this juncture, it is not for this court to interfere with any facts implored in the litigants' respective pleadings. I refer to *Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and*

I *another suit* [2003] 2 MLJ 226 where Vincent Ng J held that at p 231:

... On the topic of 'material facts', I need do no more than to quote the pertinent dicta from three cases, expressed as follows: '*The basic principle is that the pleading must contain 'a statement in a summary form for the material facts ... but not the evidence by which they are to be proved*' — per Murray Aynsley CJ in *Re Lee Siew Kow,*

decd [1951] MLJ 224, '... the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.' — per Cotton LJ in *Philipps v Philipps* (1878–1879) 4 QBD 127 at p 139 ...

[15] Besides, the plaintiff also alleged that the impugned statements contradicted s 52 of the Evidence Act 1950 which says:

> 52 *In civil cases character to prove conduct imputed irrelevant.*
>
> In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except so far as his character appears from facts otherwise relevant.

[16] On the contrary, the defendant argued that the impugned statements do not constitute character evidence but rather the explanation and response of certain events that had been pleaded by the plaintiff in his statement of claim. The defendant further premised that even if the impugned statements could be character evidence, it should not be struck out by this court because it falls under the exception provided under s 52 of the Evidence Act: '... except so far as his character appears from facts otherwise relevant'.

[17] In *Tube Home (M) Sdn Bhd v P Shanmugam @ SA Ponmugam & Anor* [2010] 1 MLJ 206, the plaintiff had attempted to discredit the late Encik Moinuddin by calling PW5 to testify that there was a disciplinary proceeding initiated against the late Encik Moinuddin for acting without lawful authority in another case. The defendant objected on the grounds that the statements made by PW5 were irrelevant to the case at hand. Ramly Ali J (as he then was) held that the disciplinary action against the late Encik Moinuddin was inadmissible since it amounted to bad character evidence and was unrelated to the present action. In this case, the plaintiff alleged that the defendants were negligent in exercising their duties as the plaintiff's patent agent in relation to the filing, prosecution, and registration of the plaintiff's new invention.

[18] In our present case, the defendant submitted that the impugned statements were in fact relevant since it was the defendant's version about how the plaintiff came into the defendant's employment and the plaintiff's subsequent transfer to and resignation from Yayasan Aman. On this, I am in agreement with the defendant. Looking at the impugned statements, it would be unjust for this court to ignore and simply expunge the defendant's averment in response to the issue raised by the plaintiff in his statement of claim. Even if such fact leads to bad character evidence, it is the defendant's duty to prove it as such. As far as this court is concerned, the defendant is allowed to plead facts that he deemed necessary to be his defence. If at all, the parties can explore this in their submissions at the end of trial. Only then this court will determine this issue.

[19] This court refer to the then Federal Court decision in *CC NG & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, where His Lordship Seah FCJ (as he then was) set aside the order for striking out and opined at p 350 that:

> In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the court is invoked to strike out a writ and/or statement of claim on the ground that it was an abuse of process of the court. *The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution (per Lord Diplock in Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1). In Lawrance v Norreys (1890) 15 App Cas 210, 219 Lord Herschell said words to the same effect that 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved'. In our opinion, the question posed before the learned judge ought to be decided at the trial.* (Emphasis added.)

[20] The defendant had contended that it is imminent for the impugned statements to remain in the defendant's defence as it was pleaded to explain the defendant's version of facts that led up to the alleged sexual assault. The impugned statements were also in direct response to the plaintiff's allegation in the statement of claim. In view of ratio in *CC Ng* and all the other discussion above, I agree with the defendant and see no reason to deprive the defendant of the change to plead his case.

[21] This application also seeks to strike out the defendant's counterclaim. The plaintiff alleged that the defendant, in his counterclaim failed to plead the following:

(a) how does the plaintiff's claim constitute an abuse of process?

(b) who are the alleged individual(s) in connivance with the plaintiff?

(c) what is/are the role(s) of the said individual(s) in purportedly trying to tarnish the political reputation of the defendant? and

(d) what is the damage suffered by the defendant as a result of the main suit?

[22] The plaintiff further argued that the defendant's counterclaim also ought to be struck out since it failed to disclose any reasonable cause of action and was unsustainable. It is also the plaintiff's submission that the defendant would not be able to prove his case since the key witnesses had died. With due respect, I disagree.

[23] The fundamentals to the tort of an abuse of process can be reiterated from the judgment of His Lordship Gopal Sir Ram JCA (as he then was) in

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 at pp 434–435:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he as against another. *When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process*. (Emphasis added.)

[24] His Lordship further articulated that in order for a litigant to succeed in his claim for the tort of an abuse of process, he must fulfil all these these essential elements:

(a) the process of complained of must have been initiated;

(b) the purpose of initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(c) the plaintiff must have suffered some damage or injury in consequence.

[25] Hence, the question needs to be answered at this juncture is whether the defendant has pleaded all these essential elements in his counterclaim? The defendant in his counterclaim alleged that the plaintiff's brought this action to tarnish the defendant's reputation and his political career. In regard to the first element, I am in no doubt that this fact had already been pleaded in paras 46 and 47 of the defendant's counterclaim.

[26] For the second element, I also find that the defendant had sufficiently pleaded the collateral purpose of his counterclaim against the plaintiff. It is crucial to note that this application is not a mechanism for the plaintiff to force a preliminary hearing on the merits but is to determine from the pleading whether the defendant's counterclaim has no reasonable cause of action or if it is frivolous, vexatious or an abuse of court process. As highlighted in *Bandar Builder Sdn Bhd v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, the court would only exercise any of the four limbs of O 18 r 19(1) of the ROC 2012 when the claim brought by the litigants is *prima facie* obviously unsustainable.

[27] Here, the defendant had extensively stated his case about the plaintiff's collateral purpose to bring the action against him. Nonetheless, the plaintiff argued that the defendant had not been able to produce any evidence to

support his allegation in his affidavit in reply because Mr SM Mohamed Idris had since passed away. Consequently, the plaintiff submitted that this also shows that the defendant would not be able to produce any evidence during trial. Again, I disagree with the plaintiff. As provided in *Malayan Building Society*, the defendant only needs to show to this court that he had pleaded all three elements to initiate an action for tort of abuse of process. And as far as this court is concerned, the defendant had done as such. Besides, the key rule to pleading is to plead material facts and not evidence. Order 18 r 7 of the ROC 2012 could not be clearer on this. In our present case, the defendant has pleaded his case in his counterclaim. How he would establish or prove his case during trial is entirely up to him. Likewise, how he would establish his case when a key witness has passed away is something for him and his team to work out during trial. The court could not strike out the defendant's counterclaim at interlocutory stage just because the plaintiff believes that the defendant could not prove his counterclaim.

[28] On this, I find the ratio of Ramly Ali JCA (as he then was) in the Court of Appeal case of *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473 extremely useful:

> [14] *A striking out application is not a trial on affidavits. It is not an application where the parties have to adduce evidence to establish the merits of their case. The court should not conduct a minute examination of the documents and the facts of the case. So long as the claim on the face of it disclose some cause of action or raises some question fit to be tried it should not be struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out.*
>
> [15] *A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial* (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court)). (Emphasis added.)

[29] Likewise, in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235, again Ramly Ali JCA (as His Lordship then was) observed (at p 242) that:

> [17] For sub-para (1)(b) the learned judge was entitled to look at the affidavit evidence adduced by the parties. She must appreciate that it is not appropriate in striking out proceedings to resolve conflict of evidence (as in the present case) on affidavits; the proper time for doing so is at discovery or by cross-examination of witnesses or deponents. Contested matter, where facts are in dispute, could not be resolved by affidavit in evidence. In order to invoke the provisions, the underlying fact must not be in dispute and the matter is purely a question of fact and the law.

[30] Thus, I find that the defendant's counterclaim is not one of those cases suitable to be struck out at this juncture. There are several issues that require lengthy deliberation concerning various allegations raised under the said counterclaim.

[31] Furthermore, I also find, from the pleading, that the defendant had successfully pleaded the particulars for the third element for the tort of an abuse of process. Thus, there is a reasonable cause of action raised by the defendant in his counterclaim. The rest must be determined via *viva voce* evidence during trial.

[32] The plaintiff also submitted that the defendant should have brought a striking out application if the plaintiff's action constituted an abuse of process rather than filing a counterclaim. Again, I disagree. To my mind, it is up to the defendant to choose whatever action he deems suitable for him to put forward his claim as long as it is within the rule and procedure of the court. Since, the action for tort of abuse of process is an action recognised in our courts, there is no reason for this court to dismiss it as such.

[33] It is trite that the action for abuse of process of court can be classified into two categories. In *Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and another appeal* [2018] 2 MLJ 51, Hamid Sultan JCA explained this at p 63:

> ... (b) Abuse of process of court:
>
> (a) it is now well recognised that there are *two types of abuse of process of court. One is related to court proceedings itself where for example the court can order a matter to be struck out under O 18 r 19* or inherent jurisdiction or stay proceedings, etc. *The applicant who succeeds in such procedure will only be entitled to costs and not damages*;
>
> (b) *the other type is the common law action of tort of abuse of the process of the court. A claimant who succeeds in the action will be entitled to costs as well as damages, etc*; and
>
> (c) both are abuse in a generic term only but the relief and the elements required to establish will be different. It will be based on rules of court and/or laws. Abuse in both generally means everything, which is contrary to good order established by usage. *Abuse of process of court refers to situation where the court's process is used for unlawful and not for the actual purpose intended to achieve justice* (see *Castro v Murray* (1875) LR 10 Exch 213; Janab's Key To Civil Procedure (5th Ed) pp 252–255). (Emphasis added.)

[34] Thus, when a defendant contends that the case against him/her is an abuse of court process, he has two options: either to apply to strike out the

claim through an application under O 18 r 19 of the ROC 2012 or to have a separate (counter)claim against the plaintiff. In case of the earlier, the defendant would be awarded costs unlike the latter, in which case, if the defendant successes in his (counter)claim under tortious action of abuse of court process, would be awarded damages and costs. The ball is always at the defendant's court to decide which of the two causes is to be taken. There is nothing wrong if the defendant in such situation, just like the defendant in our present case, opts to pursue the second option. The court would not stop him/her from proceeding with a counterclaim for abuse of court process just because the option under O 18 r 19 is available.

[35] In addition, the defendant also, in his affidavit in reply to this application (encl 29), raised several issues of facts which must be scrutinised by this court vie *viva voce* evidence. For instance, the defendant averred that the context of the first meeting between him and the plaintiff was not as pleaded by the plaintiff in his statement of claim. Moreover, the reason why the plaintiff was transferred to Yayasan Aman was also in question and in dispute since both parties have their own versions about it. Hence, these issues need to be further ironed out during trial by calling the material witnesses to give testimony. As cautioned by Ramly Ali JCA (as he then was) in *Sivarasa Rasiah* (at [15]), a striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. Further, it should not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial.

[36] Therefore, the grounds raised by the plaintiff are not enough for this court to dismiss the defendant's counterclaim at this stage. As discussed earlier, there are conflicting facts and serious issues to be tried in this action. Hence, it would not be just at this stage to deny the defendant the chance to put forward his case in trial.

CONCLUSION

[37] To sum up, it is my finding that the plaintiff has failed to prove to this court that the impugned statements and the defendant's counterclaim ought to be struck out interlocutorily. This court, therefore, dismiss the plaintiff's application of striking out, namely, this application in encl 23 with costs.

Enclosure 23 dismissed with costs.

Reported by Dzulqarnain Ab Fatar